

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Yusef Lateef Phillips)	
)	
<i>Plaintiff,</i>)	
)	19-cv-331
<i>-vs-</i>)	
)	<i>(Judge Hala Y. Jarbou)</i>
Andrew Hinds,)	<i>(Magistrate Judge Sally J. Berens)</i>
)	
<i>Defendant.</i>)	

AMENDED MOTION PURSUANT TO RULE 56(e)(1)

Pursuant to Rule 56(e)(1) of the Federal Rules of Civil Procedure, plaintiff, by counsel, moves the Court for leave to file the attached signed declaration from Ray Lee and to withdraw plaintiff's previous motion (ECF No. 117) that sought 28 days to file the signed declaration from Mr. Lee.

Grounds for this motion are as follows:

1. Plaintiff's brother, Ray Lee, witnessed the police shooting that gives rise to this case. Lee is presently a federal prisoner, 21788-040, at FMC Devens in Ayer, Massachusetts.

2. The parties sought to depose Mr. Lee before the close of discovery. In September of 2020, the Warden agreed that a deposition could go forward at the prison. (ECF No. 112-3 PageID 1205.) The prison, however, was unable to accommodate a telephonic deposition. (ECF No. 112-4, PageID 1209 Plaintiff's counsel was unwilling to travel from Illinois

to Massachusetts to visit the prison during the COVID-19 pandemic. (ECF No. 112-5, PageID 1214.) Lawyers who visited federal prisons during the pandemic were not immune from the virus: each of the two lawyers who visited death row inmate Lisa Montgomery, contracted COVID-19 after visiting her in October and November of 2020. *Montgomery v. Barr*, No. CV 20-3261 (RDM), 2020 WL 6799140, at *2 (D.D.C. Nov. 19, 2020). In addition, the Centers for Disease Control has consistently advised that travel “increases your chance of spreading and getting COVID-19.” CDC, Travel During COVID-19, available at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html>.

3. Officers from the Grand Rapids Police Department questioned Lee after the shooting and recorded the interrogation. Plaintiff relies on statements Lee made during the interrogation to respond to defendant’s motion for summary judgment.

4. Defendant opposes use of Lee’s statement because it is not presented in the form of an affidavit or a declaration.

5. The Sixth Circuit discussed in *Bolson Materials Int’l Corp. v. 3D Systems Corp.*, 746 F. App’x 445 (6th Cir. 2018) the appropriate procedure when, on summary judgment, a party objects to exhibits as hearsay. The question presented is whether the evidence could “be

presented in a form that would be admissible in evidence.” *Id.* at 450 n.2 (quoting FED. R. CIV. P. 56(c)(2).) When, as in this case, a timely objection is made, the proponent of the challenged materials could, and plaintiff argues should, be “afforded the opportunity to address the objections and proffer proper evidence.” *Id.* (quoting FED. R. CIV. P. 56(e)(1).)

6. Following receipt of defendant’s motion to strike, plaintiff’s counsel mailed to Mr. Lee a proposed declaration to resolve the evidentiary objections. Mr. Lee signed the declaration and returned it to counsel by United States. Counsel received the signed declaration on March 26, 2021 and attaches it to this motion.

WHEREFORE plaintiff requests that the Court grant him leave to file the attached signed declaration from Ray Lee and to withdraw plaintiff’s previous motion (ECF No. 117) that sought 28 days to file the signed declaration from Mr. Lee.

Respectfully submitted,

/s/ Kenneth N. Flaxman
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<i>Defendants.</i>)	

DECLARATION OF RAY LEE

The undersigned, under penalty of perjury under the laws of the United States of America, certifies that the following statements are true:

1. My name is Ray Lee. I am the brother of Yusef Lateef Phillips. I am a federal prisoner, number 21788-040, at FMC Devens in Ayer, Massachusetts.
2. I was arrested with my brother on September 3, 2017 in front of 3841 Whispering Way Drive in Grand Rapids, Michigan. My brother was shot during the arrest.
3. Before the shooting, my brother and I had walked down the stairs from the apartment building. We were both standing up and just walking. It was about 4 a.m. and it was pitch dark.
4. As we were walking, I heard someone say "Freeze." I did not know who the person was who said that. That person did not say he was a

police officer. Nor did that person say "Police, don't move, get on the ground?"

5. I heard a gunshot immediately after I heard the word "freeze."

6. My brother did not any time during the incident make any movement with either of hands toward his waistband.

7. My brother was not in a crouching position when he was shot.

Dated: March 22 2021



Ray Lee